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NO. 96-663

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARVIN KLEHR AND MARY KLEHR, Petitioners
v.
A. O. SMITH CORPORATION AND
A. O. SMITH HARVESTORE PRODUCTS, INC., Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PLAINTIFFS' EXECUTIVE COMMITTEE, MDL NO. 1069, AND OF DAVID S. FORBES, ET AL

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INTEREST OF AMICI CURIAE

I. Plaintiffs' Executive Committee, Honda Litigation

Plaintiffs' Executive Committee, *In re American Honda Motor Co., Inc. Dealer Relations Litigation, MDL 1069*, represents approximately 50 Honda and Acura dealers who have brought racketeering actions against American Honda, Honda North America, Honda Limited (the Japanese parent of American Honda), and numerous Honda executives, employees and non-Honda employee co-conspirators. All of these cases have been referred by the Judicial Panel on Multi-District Litigation to the United States District Court for the District of Maryland.

These cases stemmed from a civil case brought in the United States District Court for the District of New Hampshire by a terminated Acura automobile dealer. In February, 1993, after hearing evidence of bribery in that case, *Nault v. American Honda Motor Co.*, D. N.H. No. 89-384M, the United States District Court for the District of New Hampshire (McAuliffe, J.) referred the matter to the United States Attorney for that District. Investigation by the United States Attorney resulted in 13 indictments of Honda employees in March, 1994.

The indictments alleged that the defendant executives of American Honda had engaged in a kickback and bribery scheme between 1979 and 1992 to accept bribes from certain Honda and Acura dealers in exchange for franchises, increased allocation of cars, and favorable treatment. The criminal case against the Honda executives was described by the press as the largest commercial bribery case in United States history (*Los Angeles Times*, August 22, 1995, p. D6).

Dealers injured by the bribe-based allocation system brought suit in a variety of federal district courts alleging violations of Racketeer Influenced and Corrupt Organization ("RICO"), the Robinson-Patman Act, the Auto Dealers Day in Court Act, breach of contract, and various state law claims. In August, 1995, the Panel on Multi-District Litigation referred these cases to Chief Judge J. Frederick Motz of the United States District Court for the District of Maryland.

The Honda defendants in this civil action have indicated their intent to file motions to limit liability based upon statute of limitation rules. Plaintiffs have little doubt that such motions will be unsuccessful, because they believe the court will, after extensive evidentiary hearings, find that fraudulent concealment, equitable tolling and equitable estoppel prohibit assertion of such a defense. However, in an effort to eliminate this further expense and delay in obtaining a remedy, the plaintiff *amici* appear in this litigation to urge this Court to adopt the sound civil RICO accrual rule of *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988).

II. David S. Forbes, et al

Forbes v. Eagleson, E.D. Pa. Civ. No. 95-7021, is a RICO class action on behalf of all professional hockey players

who played for NHL teams from 1975 through 1991. The defendants include R. Alan Eagleson, former executive director of the hockey players' union, the National Hockey League Players' Association ("NHLPA") and the NHL team owners. The complaint alleges that from 1975 through 1991, Eagleson received a continuous stream of bribes, in violation of 29 U.S.C. § 186, from team owners. The owners controlled Eagleson through these bribes, thereby keeping the union weak and the players perennially underpaid.

The bribe scheme centered around a series of international hockey tournaments organized by Eagleson beginning in the mid-1970's. The tournaments included all-star teams from Canada and the United States made up of many of the best NHL players. Eagleson convinced the NHL owners to allow the players, otherwise prohibited by their contracts from playing outside the NHL, to play in the tournaments. He also persuaded the players, to whom he was a fiduciary and over whom he exercised virtual total control, to play in the tournaments. Year after year, the owners permitted Eagleson to control the tournaments' finances on their behalf. It is now known that, at least until the end of 1991, Eagleson skimmed a substantial portion of the tournament profits himself.

During the entire time period from the mid-1970's until 1992, and indeed to the present, the owners either knew Eagleson was pocketing their money, or, in the alternative, even though they were on notice of his financial self-dealing, they never asked Eagleson for an accounting. In return, Eagleson sold out the players' interests at the labor bargaining table and in individual negotiations, causing the players hundreds of millions in lost compensation, most of which resulted in increased profits to the owners and some of which found its way into Eagleson's pocket.

As in most labor racketeering schemes, the bribe arrangement between the owners and Eagleson was sophisticated, subtle and secret. For that reason and because Eagleson ran the NHLPA with dictatorial control, intimidating the players from questioning his decisions, he and the owners were able to conceal the bribe scheme for years. It was not until 1994 that the District of Massachusetts issued a RICO indictment, in *United States v. Eagleson*, D. Mass. No. 94-10054-N17G, charging Eagleson with embezzling from the NHLPA, that the players had actual documentation of the bribe pattern.

Forbes v. Eagleson was filed in the Eastern District of Pennsylvania on November 7, 1995, within four years after Eagleson's resignation as Executive Director of the NHLPA. That Court (O'Neil, J.) denied the owners' motion to dismiss based on the statute of limitations, applying the civil RICO accrual rule of *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). *Forbes v. Eagleson*, E.D. Pa. Civ. No. 95-7021 (July 23, 1996). *Amici* urge that the same rule be adopted by this Court.

SUMMARY OF ARGUMENT

RICO originated as a criminal statute which was designed to facilitate prosecutions of complex criminal organizations. RICO gives prosecutors many of the procedural and evidentiary advantages they wield in prosecuting conspiracies. Chief among these is a statute of limitations which does not accrue until the last overt act is committed in furtherance of the RICO enterprise. *See* Part I,A.

RICO is also a remedial statute. RICO's civil remedies were designed to empower civil plaintiffs as private attorneys

general to "fill prosecutorial gaps" in bringing racketeers to justice. In light of this intent, these plaintiffs should be given a statute of limitations accrual comparable to that provided to prosecutors of criminal racketeering. *See* Part I,B.

Keystone Insurance Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988) held that a civil RICO claim accrues when plaintiff knew or should have known of the last predicate act in the RICO pattern. This rule most closely embodies Congress' intent in giving civil plaintiffs quasi-prosecutorial remedies against racketeering. The *Keystone* rule also is appropriate because it allows a RICO victim to recover for all injuries caused by a pattern of racketeering, even those occurring prior to the limitations period. Finally, *Keystone* will ease the judicial task by dispensing with the lengthy and fact-intensive hearings, necessary to address tolling under other accrual rules. For these reasons, *Keystone* is appropriate as a national rule of civil RICO accrual. *See* Part II.

The "injury discovery" accrual rule does not give civil plaintiffs adequate opportunity to discover the critical "pattern" of racketeering. A pattern of racketeering may take years to occur, let alone be discovered and pled with sufficient particularity to satisfy Fed. R. Civ. P. 9(b). If plaintiffs are held to a rule whereby their RICO claim accrues at the first knowledge of injury, then a RICO claim could be time barred before it even exists. *See* Part III,A.

The pattern is too essential to a RICO claim, and the inequity of an accrual rule that gives it short shrift is too glaring, to be cured by a separate tolling doctrine. Reliance on a tolling rule will result in lower courts' unnecessarily being forced to decide complex legal and factual issues to determine whether any RICO claim can proceed. *See* Part III,B.

The "pattern discovery" accrual rule will still burden the District Courts with lengthy and expensive fact-finding as to which of several tolling doctrines should apply, in addition to fixing the point of accrual itself. Further, the Court of Appeals read a "new and independent injury" element into the pattern discovery rule, which it interpreted overly narrowly. *Keystone's* accrual rule avoids these pitfalls and is therefore superior to the pattern discovery rule. *See* Part III,C.

Finally, the Clayton Act does not furnish the proper model for accrual of a RICO claim. A claim accrues under the Clayton Act upon each discrete injurious act. An accrual rule framed upon singular, discrete acts cannot govern RICO claims, which by their nature must allege a continuous spectrum of related acts. *See* Part III,D.

The Third Circuit's accrual rule most effectively reflects RICO's criminal history and its remedial goals, and *amici* urge this Court to adopt it.

ARGUMENT

I. RICO's Purpose Supports an Expansive Rule of Accrual

A. RICO Originated as a Criminal Statute

Definition of civil RICO's statute of limitations rule of accrual must begin with an examination of the statute's criminal origins. RICO represented an entirely different model of understanding and combating crime. The traditional model was to investigate crime on an occurrence-by-occurrence basis, and to prosecute and incarcerate the perpetrator of each individual crime. In order to account for crime's increasing

organization and complexity, RICO identifies crimes described as "a course of conduct involving relationships with criminal groups rather than as a single moral act." Lynch, *RICO: The Crime of Being a Criminal* (pts. 3 & 4), 87 Colum.L. Rev. 920, 952-53 (1987).

Along with this change in focus, RICO endows prosecutors with powerful advantages. These include forfeiture of the defendants' interest in the racketeering enterprises, 18 U.S.C. § 1963(a), the psychological prejudice of answering to the pejorative charge of "racketeering", and extension of the statute of limitations for as long as the defendant commits predicate acts in furtherance of the enterprise. *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied sub nom. Russo v. United States*, 486 U.S. 1022 (1988), 100 L. Ed.2d 277, 108 S. Ct. 1995 (1988); *United States v. Pepe*, 747 F.2d 632, 633 (11th Cir. 1984).

These advantages have not gone uncriticized. The criticism of the latitude bestowed by RICO on prosecutors, *see* B. Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165 (1980), is reminiscent of the debate earlier in this century over conspiracy prosecutions, the original "darling of the prosecutor's nursery". *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.).

The advantages which made conspiracy the darling of the prosecutor's nursery were abundant. Venue in a conspiracy case is proper wherever any overt act is committed. *Hyde v. United States*, 225 U.S. 347, 360-64, 56 L. Ed. 1114, 32 S. Ct. 793 (1912). The scope of the conspiracy may be inferred from circumstantial evidence. *Blumenthal v. United States*, 332 U.S. 539, 549, 91 L. Ed. 154, 164, 68 S. Ct. 248 (1947). Hearsay in furtherance of the conspiracy is admissible against

co-conspirators. *Krulewitch v. United States*, 336 U.S. 440, 443, 93 L. Ed. 790, 794 , 69 S. Ct. 43 (1949). Thus, the demonstrated guilt of some defendants may "spill over" to others tried jointly. *Kotteakos v. United States*, 328 U.S. 750, 774-75, 90 L. Ed. 1557, 1571-1572, 66 S. Ct. 1239 (1946).

Tying together all of conspiracy's procedural and evidentiary advantages to prosecutors is a lengthened statute of limitations. The longer a conspiracy is deemed alive, the more of these advantages a prosecutor can claim. The statute of limitations in a criminal conspiracy does not run until the performance of the last overt act furthering the conspiracy. *Grunewald v. United States*, 353 U.S. 391, 404, 1 L. Ed.2d 932, 939, 77 S. Ct. 963 (1957); *Hyde v. United States*, 225 U.S. 347, 56 L. Ed. 1114, 1127, 32 S. Ct. 793 (1912).

The relaxed procedural and evidentiary rules available in prosecuting conspiracies led many to fear conspiracy's growth from darling of the nursery to maniacal schoolyard bully. *See, e.g., Krulewitch, supra* at 445-449, 93 L. Ed at 795-801 (Jackson, J. concurring, describing conspiracy as "that elastic, sprawling and pervasive offense."). Nevertheless, conspiracy prosecutions gained importance and acceptance. This acceptance was premised on the belief that the increased potency of a conspiracy prosecution was commensurate with the increased threat posed by crimes forethought and coordinated by conspirators as compared to the same crimes randomly committed by independent individuals. *See, e.g., Callanan v. United States*, 364 U.S. 587, 593-94, 5 L. Ed.2d 312, 317, 81 S. Ct. 321 (1961); *Pinkerton v. United States*, 328 U.S. 640, 646, 90 L. Ed. 1489, 1496, 66 S. Ct. 1180 (1946).

The parallels to RICO are obvious. For that reason, looking to conspiracy law, courts in substantive criminal RICO

cases start the limitations clock running at the defendant's last predicate act in furtherance of the enterprise. *United States v. Persico*, 832 F.2d 705, 713-14 (2d Cir. 1987), *cert. denied* 486 U.S. 1022, 100 L. Ed.2d 227, 108 S. Ct. 1996 (1988). A RICO conspiracy charge may be brought within five years after the conspirators have achieved or abandoned their purpose. *Id.*; *United States v. Torres Lopez*, 851 F.2d 520, 525 (1st Cir. 1988), *cert. denied* 489 U.S. 1021, 103 L. Ed.2d 204, 109 S. Ct. 1144 (1989). The defendant may be charged with predicate acts extending back the length of the enterprise as long as the last predicate act occurred within five years of the indictment. *Persico, supra*; *United States v. Vogt*, 910 F.2d 1184, 1195-96, (4th Cir. 1990), *cert. denied* 498 U.S. 1083, 112 L. Ed.2d 1043, 111 S. Ct. 955 (1991). These cases all trace their reasoning to "continuing violation" criminal cases, which measure the limitations period from the point at which the crime is complete. *See, Persico, supra, citing Toussie v. United States*, 397 U.S. 112, 115, 25 L. Ed.2d 156, 90 S. Ct. 858 (1970). This same accrual model should apply in civil RICO actions.

B. RICO is a Remedial Statute

In a portion of the statute that remains uncodified, Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes." Section 904(a) of Pub. L. No. 91-452, 84 Stat. 947. "The statute's remedial purposes are no where more evident than in the provision of a private action for those injured by racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98, 87 L. Ed.2d 346, 359-60, 105 S. Ct. 3275 (1985). RICO's power as a criminal statute and its expansive interpretation as a civil remedy are simply two edges to the same weapon against racketeering, since "[p]rivate attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." *Sedima, supra* at 493, 87

L. Ed.2d at 357[1]. If civil plaintiffs are to act as private attorneys general in bringing racketeers to justice, they should be given a statute of limitations accrual which enables them to be as effective as prosecutors of criminal RICO.

Even a cursory review of legal history reveals a gradual divergence of the public and private consequences of criminal acts. The separation of public and private rights began to cause profound societal concern by the mid-1970's. By the end of the 1970's, the interest of victims of violent crime had come to the attention of the courts and the public. Victims' rights statutes, such as rape shield statutes, first protecting privacy interests, began to appear. In the last ten years, statutes which give victims input in the sentencing process itself were enacted by the Congress and in virtually every state. *See, e.g.*, 18 U.S.C. § 3553(7). RICO itself, and the evident Congressional intent to allow its expansive use in civil cases, reflects Congress' concern with the illegal use of aggregations of economic power and with providing a remedy to victims of crime. It would be patently inconsistent with the trend of vindicating crime victims to apply to RICO a restrictive accrual rule limiting the ability of injured parties to recover their damages.

Amici respectfully urge the Court to adopt the accrual rule which is truest to RICO's history as a criminal statute and to its self-consciously remedial purpose: that a civil RICO action accrues when plaintiff reasonably becomes aware of the enterprise's last overt act.

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[1] On July 2, 1996, the President signed into law the Anticounterfeiting Consumer Protection Act of 1996, 104 P.L. 153, 100 Stat. 1386. The Act strengthens the hand of private business against video and software piracy by, among other measures, making such piracy a RICO predicate act. This statute demonstrates the belief of both the Executive and Legislative branches in the continued necessity and vitality of civil RICO's remedial purposes.

II. The Third Circuit's "Last Predicate Act" Rule Promotes RICO's Purposes

A. *Keystone* Most Closely Embodies Congressional Intent

Keystone Insurance Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988) was one of the first cases from the Circuit Courts of Appeals decided after *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 154, 97 L. Ed.2d 121, 132, 107 S. Ct. 2759 (1987) to address the question left open by that decision, namely, when a civil RICO action accrues. It ruled that a RICO action accrues when plaintiff knew or should have known of the last injury or the last predicate act of the complained-of racketeering pattern. 863 F.2d at 1130.

Keystone discerned in the statutory language and in this Court's opinions three essential themes in developing a civil RICO accrual rule. First, a civil RICO claim has several unique elements which differentiate it from a claim for the underlying predicate acts -- for example, the enterprise and the pattern -- and the discovery rule should apply to each one. 863 F.2d at 1130. Second, the nature of a RICO violation is such that Congress must have intended that it be treated as continuing, and is not likely to have intended the civil claim to accrue before the crime was complete. *Id.* at 1131. Finally, the Third Circuit took to heart Congress' mandate that RICO "shall be liberally construed to effectuate its remedial purpose." *Id.* at 1128, *citing* Organized Crime Control Act, Pub. L. No. 91-452 § 904(a), 84 Stat. 942, 947 (1970).

The *Keystone* rule is most true to Congress' intent to protect and empower the victims of racketeering because it

ensures that plaintiffs (such as *amici*) will not be foreclosed from their claims while still unaware of them. *Keystone* simply allows defendants by their own continuing wrongful actions to postpone accrual of the cause of action that will remedy those wrongs. Not coincidentally, this accrual rule is the same applied in criminal RICO prosecutions, bringing to bear Congress' intent to allow civil plaintiffs to fight racketeering in situations where the Government for good reasons may decline to bring indictments.

Amici submit that *Keystone's* conformance to RICO's history as a criminal statute, as well as its inherent fairness, favor its adoption as the national civil RICO accrual rule, and urge this Court to do so.

B. *Keystone* Recognized the Importance of Capturing All Predicate Acts

Importantly, *Keystone* recognized that, once a complaint is deemed timely, the plaintiffs should be allowed to recover for injuries dating from the beginning of the pattern, even if those injuries are beyond the limitations period. 863 F.2d at 1183-33. Again, this holding is the result of careful examination of Congress' intent in enacting the statute. The Court recognized that 18 U.S.C. § 1961(5) requires of a pattern only that it consist of two predicate acts within ten years, and continued:

> It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years. To do so would encroach upon and limit a legislatively-enacted scheme to provide recovery for racketeering injuries.

863 F.2d at 1133, *citing* 18 U.S.C. §§ 1961(5), 1964(c).

Keystone's conclusion in this regard is neither startling nor unprecedented. *Keystone* drew on thirty years of cases applying accrual rules to federal statutory causes of action involving patterns of wrongful conduct or injury. For example, *Keystone* recognized that in sex discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, plaintiff has a 180 day statute of limitations before filing a complaint with the EEOC. However, plaintiff can recover for earlier incidents if she can demonstrate a pattern of discrimination, the last act of which occurred within the limitations period. *See, e.g. Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir. 1982); *Acha v. Beame*, 570 F.2d 57, 65 (2d Cir. 1978), *cited in* 863 F.2d at 1129. *See also, Cornwell v. Robinson*, 23 F.3d 694, 703-04 (2d Cir. 1994); *West v. Philadelphia Electric Co.*, 45 F.3d 744, (3d Cir. 1995) (approving relation back where plaintiff alleges pattern of discrimination).

Keystone also found support for capturing a pattern of conduct for statute of limitation purposes in a long-standing Third Circuit case interpreting the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* *Fowkes v. Pennsylvania Railroad Company*, 264 F.2d 397 (3d Cir. 1959) had no difficulty in finding plaintiff's action timely where his injuries had resulted from a pattern of repetitive injuries, at least some of which occurred within the FELA's three-year limitations period. 264 F.2d at 399, *cited in Keystone* at 863 F.2d at 1129.

In addition to *Keystone's* examples, federal courts have allowed complaints to relate back and capture lengthy patterns of wrongful conduct in other familiar statutory contexts. The Fair Housing Act of 1968, 42 U.S.C. § 3612(a), specifically contemplates such relation back. Under that statute, plaintiff must file a suit within 180 days of the alleged discriminatory housing practice. However, if plaintiff can demonstrate a pattern of discrimination, the last act of which occurred within 180 days prior to filing suit, she may recover for damages arising out of the entire pattern. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81, 71 L. Ed.2d 214, 230, 102 S. Ct. 1114 (1982). "Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act...." 455 U.S. at 380, 71 L. Ed.2d at 230.

These cases demonstrate that federal courts have for years been successfully applying accrual rules to complaints alleging patterns of statutorily prohibited conduct. No different accrual rule need apply simply because the statute violated is RICO. *Keystone* correctly applied to a RICO case the same relation back doctrine which has governed federal statutory "pattern" causes of action for decades.

Forbidding relation back would assume that Congress intended that criminals could be jailed for RICO violations for which they could not be sued, because those acts occurred too early in the pattern of racketeering to be timely under a civil complaint. One would have to find strikingly explicit support in RICO's language or history to accept this anomalous result; there is none. Instead, the statute's history and purpose, as noted above, are to give civil plaintiffs powers complementary

to those of criminal prosecutors. The only reasonable conclusion from this history and purpose is to allow a civil RICO complaint to allege *all injurious acts* of the pattern, as long as one of those acts fell within the limitations period.

C. *Keystone* is Amenable to Practical Application

Keystone solves one immense practical problem encountered by all of the other Circuits, namely, lengthy and expensive satellite litigation to determine how much plaintiff knew of her cause of action and when. In this regard, it is important to remember that the District Court's accrual inquiry will be complex because the burden on the plaintiff to allege a pattern is complex. A finding that plaintiff knew of one or two, or several, predicate acts against her will not end the District Court's inquiry, because in order even to state a RICO pattern, the plaintiff will have to be aware of many continuous and related predicate acts spanning at least one year. *See, e.g., Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) (finding no case allowing pattern under one year); *Marshall-Silver Construction Co. v. Mendel*, 894 F.2d 593, 597 (3d Cir. 1990) (seven months insufficient); *Hindes v. Castle*, 937 F.2d 868, 874-75 (3d Cir. 1991) (eight months insufficient). In addition, since various Courts of Appeal require that predicate acts target more than one victim before they amount to a pattern, *see, e.g., Vemco, Inc. v. Camardella*, 23 F.3d 129 (6th Cir.), *cert. denied*, __ U.S. __, 130 L.Ed.2d 495, 115 S. Ct. 579 (1994); *Wade v. Hopper*, 993 F.2d 1246, 1251 (7th Cir.) *cert. denied*, 510 U.S. 868, 126 L. Ed.2d 151, 114 S. Ct. 193 (1993), the District Court will have to consider whether and when plaintiff became aware that the pattern of racketeering claimed other victims as well.

The facts presented by *amici* demonstrate *Keystone's* practical applicability to real-world, long-term criminal conspiracies. In both of *amici's* cases, a decade-long pattern of bribery subverted a legitimate business enterprise, so that the enterprise operated to harm *amici's* business interests. None of the predicate acts of bribery ever became stale, because the subverted individuals, Eagleson and the Honda executives, remained at the bribers' beck and call over the entire duration of the scheme. *Keystone's* delay of accrual until the last predicate act recognizes the cumulative and indivisible subversive effect of this pattern of bribery. Its application will not unduly sacrifice the respective defendants' interest in repose. Statutes of limitation protect defendants from arguing over wrongs long past. If a defendant continues despite plaintiff's knowledge to commit criminal acts up to within four years of the complaint, no policy is advanced by insulating that defendant from her earlier crimes.

A parsimonious accrual rule adopted on the misperception that Petitioners here should have pieced together a few predicate acts and recognized a pattern may have the unintended result of diluting the "continuity plus relationship" pattern requirement that this Court labored so diligently to express in *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 106 L. Ed.2d 195, 109 S. Ct. 2893 (1989). Thus, practical as well as equitable considerations favor *Keystone's* adoption as the national civil RICO accrual rule, and *amici* urge this Court to do so.

III. Accrual Rules Espoused By Other Circuits Do Not Further RICO's Goals

A. The "Injury Discovery Rule" is Unfair

The "injury only" discovery rule, adopted by the First, Second, Fourth, Fifth, Seventh and Ninth Circuits, starts the limitations clock running as soon as plaintiff realizes she has suffered an injury. It gives no heed to whether plaintiff is aware that her injury is due to bad luck, another's simple negligence, or a pattern of racketeering. By ignoring plaintiff's awareness of the pattern, the "injury only" discovery rule threatens to eliminate plaintiff's cause of action before she is aware of all of its elements. Fairness counsels otherwise.

"[T]he heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143, 154, 97 L. Ed.2d 121, 132, 107 S. Ct. 2759 (1987) (emphasis in original). *See also H.J., Inc. v. Northwestern Bell,* 492 U.S. 229, 236, 106 L. Ed.2d 195, 206, 109 S. Ct. 2893 (1989) (describing and interpreting "RICO's key requirement of a pattern of racketeering"). No other criminal statute outlaws a "pattern" of any type of behavior. No other civil remedy requires that plaintiff demonstrate a "pattern" of anything. The concept of "pattern" is unique to, and defines, both civil and criminal liability under RICO.

Northwestern Bell established the now-familiar requirements of "continuity" and "relatedness" for pleading a RICO pattern. 492 U.S. at 238-39, 106 L. Ed.2d at 207-08. The Courts of Appeals have appropriately responded to *Northwestern Bell* by demanding additional specificity in civil RICO complaints. No longer are a few fraudulent acts targeted

at one victim for a few months sufficient to allege a RICO pattern. In most Circuits, the pattern must continue for over a year, *Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992), and must involve several victims besides the plaintiff. *Vemco, Inc. v. Camardella*, 23 F.3d 129 (6th Cir.) *cert. denied*, __ U.S. __, 130 L.Ed.2d 495, 115 S. Ct. 579 (1994); *Wade v. Hopper*, 993 F.2d 1246, 1251 (7th Cir.), *cert. denied*, 510 U.S. 868, 126 L.Ed.2d 151, 114 S. Ct. 193 (1993). Fairness dictates that if after *Northwestern Bell* a person wronged by racketeering must plead a complex, multi-targeted pattern of continuous and related acts, that person must be given sufficient time to discover this essential and unique ingredient of her claim.

The inequity of the injury discovery rule is all the more striking in the context of Fed. R. Civ. P. 9(b), which requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Most RICO claims, including those of Petitioners and of *amici*, include as predicate acts mail, wire or securities frauds. Several courts have applied Rule 9(b)'s requirement of particularity to the description of the pattern of predicate acts, such that plaintiff must identify the perpetrator, the recipient, the date, and the manner of each fraudulent act in the pattern. *See, e.g., Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 196 (9th Cir. 1987). The injury discovery rule whipsaws plaintiffs between the statute of limitations and Rule 9(b). By the time plaintiff has discovered the pattern of racketeering and is able to plead a RICO complaint to Rule 9(b)'s satisfaction, more than four years can easily have elapsed since she first felt an injury.

The facts presented by *amici* illustrate poignantly the inequity of the injury discovery rule. The Honda dealer

plaintiffs allege that beginning in 1979, Honda as standard practice awarded scarce automobiles and lucrative Honda dealerships to dealers who paid kickbacks to Honda executives. Plaintiff dealers, like many fraud victims, were the last to know of this arrangement. All had difficulty getting their fair share of allocated Honda automobiles. Some went out of business. However, none of them could have come close to articulating a RICO complaint until the Government issued RICO indictments revealing the staggering scope of the bribery conspiracy in March 1994.

Honda itself has argued that it did not know of, and had no reason to know of, the bribery conspiracy until a former Acura dealer from New Hampshire unearthed evidence of bribes in a civil suit in late 1991. Leaving aside the likelihood that a multi-billion dollar international corporation with its finger on the pulse of the American automobile buying public was unaware that its entire American sales force was on the take, if Honda was unaware of the pattern of racketeering until 1992, then *a fortiori* plaintiff dealers could not have known of it at least until then.

Similarly, Eagleson was the union representative and thus the fiduciary to all of the players. He used his dominant rule to intimidate them from making any real inquiries or challenges to his conduct of the union's affairs. The few players who tried to find out about Eagleson's and the tournaments' financial particulars were repeatedly stonewalled. The players had every incentive to remove Eagleson and stop the bribe scheme had they known about it earlier. However, Eagleson was able to continue the scheme until the end of 1991, by concealing his actions from the players and refusing requests for financial disclosure.

Amici were not knowledgeable plaintiffs who sat on their rights for years. Had the Honda dealers filed RICO claims as soon as they noticed their difficulty in obtaining automobiles, or had the hockey players filed as soon as they suffered decreased pay and benefits, as the injury discovery rule would have them do, they would have been subject to dismissal and possibly sanctions. At the time that they were aware of their economic losses, *amici* did not know, and could not plead consistently with Fed. R. Civ. P. 11, that they were "injured", i.e., that the losses resulted from wrong doing.

The injustice of the injury discovery rule is cast in stark relief by this single fact. Indictments were brought against both the Honda executives and Eagleson in 1994, for racketeering acts which extend back into the 1970's. Adoption of the injury discovery rule, or even of the less restrictive "pattern discovery" rule applied below, will require *amici* to litigate issues of limitation of actions which the Government, in prosecuting the criminal cases, did not need to consider.

Such a result is manifestly inconsistent with the purposes of RICO. As Justice Brennan noted in *Sedima*, in holding that a prior conviction requirement would be inconsistent with the remedial purposes of RICO,

> Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons -- not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps....This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice.

473 U.S. at 493, 87 L. Ed.2d at 357 (citations omitted).

At the sentencing hearing of the last Honda executive to appear before him, Chief Judge DiClerico of the United States District Court for the District of New Hampshire, who presided over the Honda criminal trial, expressed his concern that the president of American Honda, Koichi Amemiya, had not been brought before him. Amemiya is a defendant in the civil actions in *Honda Dealer Relations Litigation*. It would be patently inconsistent with the main current of RICO law for this Court to limit civil RICO actions, rather than allowing such actions to be brought to fill prosecutorial gaps.

B. Relying on a Tolling Rule Will Complicate the Judicial Task

Three tolling doctrines are applicable in most RICO cases which, by their very nature, involve fraud and concealment. *Equitable estoppel* is applicable where a defendant takes affirmative steps to prevent the plaintiff from suing in time. It is distinguished from *fraudulent concealment*, which "denotes efforts by the defendant -- above and beyond the wrongdoing upon which the plaintiff's claim is founded -- to prevent the plaintiff from suing in time." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261, 115 L.Ed.2d 1079, 111 S. Ct. 2916 (1991). The third tolling doctrine is *equitable tolling*, which differs from *fraudulent concealment* in that it does not assume a wrongful effort by the defendant to prevent the plaintiff from suing. It differs from the discovery rule in that the plaintiff is

assumed to know that he has been injured, "so that the statute of limitations has begun to run; but he cannot obtain the information necessary to decide whether the injury is due to wrongdoing, and if so, wrongdoing by the defendant." *Cada*, 920 F.2d at 451.

The lower courts which have adopted the injury discovery rule have recognized that such a rule is likely to cause injustice. The judicial response to the obvious injustice has often been a passing reference to these complex tolling doctrines as a panacea. For example, the Ninth Circuit has acknowledged that "a court wishing to give a plaintiff who knows of her injury time to investigate a pattern can always toll the limitations period." *Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir.), *cert. granted* ___ U.S. ___, 135 L. Ed.2d 1046, 116 S. Ct. 2521, (1996), *cert. dismissed* ___ U.S. ___, 136 L. Ed.2d 674, ___ S. Ct. ___ (1997), *citing McCool v. Strata Oil Co.*, 972 F. 2d 1452, 1465 (7th Cir. 1992).

Rodriguez v. Banco Central, 917 F.2d 664 (1st Cir. 1990) recognized that, where a plaintiff who knows of an injury from one predicate act in year one and learns of the second predicate act only in year six, application of the injury discovery rule could bar a RICO suit before it could be brought. The Court dismissed this concern, by reasoning that in Clayton Act cases, courts "have found the statutes *tolled* by fraudulent concealment." *Id.* at 668 (emphasis in original). The Court added "[o]ne can easily imagine the development of an analogous 'tolling' doctrine in RICO cases." *Id.*

Rodriguez was decided in 1990, only seven years ago, but barely at the mid-point from the beginning of wide-spread use of the RICO statute, to the present. *Sedima*, 473 U.S. at 481 n.1, 87 L. Ed.2d 349 n.1, 105 S. Ct. 3275, 3278 n.1. In the last

seven years, RICO's use in civil actions has geometrically expanded and the courts' interpretation of the statute is constantly being refined. Less than eight months ago, Congress amended the statute to expand the available predicate acts to include acts of copyright fraud, 104 P.L. 153, 100 Stat. 1386, demonstrating its belief in RICO's continuing vitality and necessity.

The solution to the potential injustice recognized by all of the lower courts who have considered application of an injury discovery rule is not to force lower courts to make nice fact finding determinations regarding fraudulent concealment, equitable estoppel, and equitable tolling. The doctrines are complex, intricate, and difficult. They will arise in nearly every RICO case because most RICO predicate acts involve fraud. Complicating the procedures to obtain the remedies available under RICO will primarily benefit the criminals who will escape liability for their acts. Such a result would be inconsistent with the clear language of the statute and the trend of the law to protect victims of crime.

A separate tolling rule is unnecessary if this Court adopts the accrual rule announced in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). The only factual inquiry under *Keystone* is when the last predicate act occurred, and when plaintiff should have been aware of this last predicate act. This is the simplest factual inquiry required under any accrual standard. Thus, by dispensing with a separate tolling doctrine, a *Keystone* standard avoids the cumbersome satellite litigation and circuit splits which would arise under the injury

discovery rule[2].

C. The Pattern Discovery Rule As Applied Below is Inadequate

1. The Pattern Discovery Rule Does Not Avoid Cumbersome Fact Finding

The "pattern discovery" rule applied below and adopted by the Sixth, Tenth and Eleventh Circuits fixes the accrual of a RICO cause of action when the plaintiff knows or should know that her injury is caused by a racketeering pattern. This rule gives proper consideration to RICO's defining pattern element, and prevents RICO claims from being cut off by the statute of limitations before they exist. However, its application still entails burdening district courts with the protracted task of determining whether and how to apply a smorgasbord of tolling rules.

For example, the Eighth Circuit adopted the pattern discovery rule in *Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1991). The same court issued another opinion the same day, also adopting the pattern discovery rule. *Vesta State Bank v. Independent State Bank of Minnesota*, 924 F.2d 155 (8th Cir. 1991). The District Court in *Vesta* on remand held further hearings and dismissed the case on summary judgment, considering and rejecting claims of fraudulent concealment.

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[2] Although *Davis v. Grusemeyer*, 996 F.2d 617 (3d Cir. 1993) addressed fraudulent concealment after *Keystone*, it appears to be the exception, rather than the rule. *See Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991); *Arab African Int'l Bank v. Epstein*, 10 F.3d 168 (3d Cir. 1993) (addressing civil RICO statute of limitations post-*Keystone*). *Amici* hockey players defeated in the Third Circuit a motion to dismiss based on the statute of limitations without lengthy examination of tolling doctrines. *Forbes v. Eagleson*, E.D. Pa. Civ. No. 95-7021 (July 23, 1996).

1991 U.S. Dist.. Lexis at *10, *13. This finding was affirmed on appeal, 1992 U.S. App. Lexis 19777 (8th Cir. 7/6/92). The further proceedings, including the second appeal, consumed 18 months and undoubtedly significant resources of both the parties and the courts involved. In contrast, the *Keystone* standard, by focusing on the last predicate act, would relieve the lower courts from the burden of applying haphazard and overlapping tolling doctrines in addition to deciding the point of accrual itself.

2. *Klehr* Defined "Independent Injuries" Too Restrictively

Klehr properly recognized that "a civil RICO action accrues with respect to 'each independent injury' to the plaintiff." 87 F.3d at 239, *quoting Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154. However, the Court of Appeals declined to consider what Petitioners allege to be independent injuries caused by Respondents' post-sale deceptive advertising because these injuries were not sufficiently "independent".

The Court of Appeals' requirement that the later injuries not only be additional, but qualitatively different from, the injuries caused by the earlier predicate acts, is an unnecessary extension of prior case law, and bears little or no relation to the original statutory language. The "rule" articulated by the Court of Appeals began as the "continuing violation" or "separate accrual" rule expressed in a Clayton Act case, *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 28 L. Ed.2d 77, 92, 91 S. Ct. 795 (1971): "In the context of a continuing conspiracy to violate the antitrust laws...each time a plaintiff is injured by an act of the defendants a cause accrues to him to recover the damages caused by that act and...as to those damages, the statute of limitations runs from the

commission of the act."

This rule was imported into RICO jurisprudence in *State Farm Mutual Automobile Insurance Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring), and reiterated in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988), *cert. denied sub nom. Soifer v. Bankers Trust Co.*, 490 U.S. 1007, 104 L. Ed.2d 158, 109 S. Ct. 1642 (1989). These cases, while recognizing that new injuries from racketeering acts start the limitations clock afresh, declined to allow plaintiffs to relate back more than four years prior to the complaint to allege damage. This result, at odds with the rule applied in criminal RICO, resulted from misplaced conformance to the Clayton Act, which does not specifically contemplate or prohibit a "pattern" of antitrust activity.

Klehr has further diverged from RICO's criminal application by now requiring that the later injuries, in order to restart the limitations clock, must be *qualitatively* different from those suffered earlier in the pattern. This requirement appears in RICO jurisprudence for the first time in 1991 with *Glessner v. Kenny*, 952 F.2d 702, 707-08 (3d Cir. 1991) and has since been adopted in *Grimmett v. Brown*, 75 F.3d 506 (9th Cir 1996), *cert. granted* ___ U.S. ___, 135 L. Ed.2d ___, ___ S. Ct. ___ (1996), *cert. dismissed* ___ U.S. ___, 137 L. Ed.2d ___, ___ S. Ct. ___ (1997), and in *Klehr*. *Klehr* refused to consider the post-sale advertising frauds as contributing to cause separate injury "because they are all of the same type, flow from the same source, and are part of one cognizable pattern of conduct". 87 F.3d at 239.

Klehr's reasoning proves too much. Under *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 106 L. Ed.2d 195, 109 S. Ct. 2893 (1989), plaintiff must plead that all of her injuries

resulted from a pattern of actions that are continuous and related. It is difficult to imagine injuries from any continuous and related pattern of racketeering that are not of the same type, flowing from the same source, and part of one cognizable pattern of conduct. *Klehr* would require a plaintiff, in order to meet the pattern requirements of *Northwestern Bell*, to plead herself out of an "independent injury" which may save her from the statute of limitations. The Eighth Circuit's strict interpretation of "separate injuries" hearkens back to its insistence on "separate schemes" in order to state a RICO pattern, which this Court explicitly reversed in *Northwestern Bell*. Affirmance of the "new and separate injury" standard would move RICO interpretation backward, not forward.

Klehr's strict interpretation of the "continuing damage" exception to accrual also suffers from the following infirmity. Under the Court of Appeals' formula, once a plaintiff is aware of her RICO claim for four years and allows the statute of limitations to pass, the defendant then has a license to renew four-year old activity and commit racketeering acts with impunity, as long as the damage to plaintiff is not radically different from what she had suffered before. The original policy behind the statute of limitation, ensuring the repose of stale claims, would hardly be served by ensuring, with a guarantee of non-liability, the revival of old injurious acts. Therefore, this Court should correct the Court of Appeals' overly narrow interpretation of the "new and independent injury" which would resume accrual of a RICO claim.

D. The Clayton Act Does Not Provide an Appropriate Accrual Model

Agency Holding Corp. v. Malley-Duff Associates, 483 U.S. 143, 97 L. Ed.2d 121, 107 S. Ct. 2759 (1987) adopted

from the Clayton Act a four-year statute of limitations for civil RICO claims. *Amici* do not dispute that the Clayton Act is the appropriate model for choosing the *length* of RICO's statute of limitations. However, key differences between the conduct proscribed by the two statutes, and the remedies available under them, undermine the Clayton Act's usefulness as a model for the *accrual* of a RICO action.

A claim accrues under the Clayton Act when a defendant commits an act that injures a plaintiff's business. *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 28 L. Ed.2d 77, 92, 91 S. Ct. 795 (1971). The Clayton Act treats multiple harmful acts by starting a new statute of limitations running at every act, but allowing plaintiff to recover only for acts and injuries occurring within four years of the complaint. *Id.*

This accrual rule does not take into account RICO's critical pattern element, which is absent from antitrust law. As *Zenith* demonstrates, each injurious act by an antitrust defendant creates a new and separate liability. However, a RICO plaintiff cannot make out a cause of action from one single injurious act. Since RICO requires plaintiff to plead a pattern, a concept which requires continuity, *H.J., Inc. v. Northwestern Bell,* 492 U.S. 229, 236, 106 L. Ed.2d 195, 206, 109 S. Ct. 2893 (1989), it should not import from the Clayton Act an accrual rule which is defined by discreteness.

Not every issue in civil RICO can be guided with a Clayton Act analog. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 87 L. Ed.2d 346, 105 S. Ct. 3275 (1985) reversed the Second Circuit's requirement of a "racketeering injury" which was derived directly from the Clayton Act's "antitrust injury". The more natural and workable model for accrual already exists

in criminal RICO prosecutions. While *Malley-Duff* recognized that the length of RICO's criminal statute of limitations was not the product of anything unique to RICO, 483 U.S. at 155-56, 97 L. Ed.2d at 133, the accrual of such a limitation is and should be based on RICO's unique qualities, including the presence of "[m]ultiple injuries, spread over time." The "last predicate act" rule adopted by the Third Circuit Court of Appeals most accurately reflects RICO's unique concepts, and should be adopted by this Court.

CONCLUSION

For the reasons stated above, the judgment below should be reversed and remanded with directions that the question of accrual of Petitioners' RICO cause of action be addressed in light of the rule stated in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988).

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